90-546

No. 90-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

SUSAN and REGGIE GRIFFITH,
on behalf of themselves and on behalf of their children,
CYNTHIA, GEOFFREY, ANTHONY, MELANIE and DAVARRIS, et al.,

Petitioners,

v.

MARLIN JOHNSTON, Individually and as Commissioner of the Texas Department of Human Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Neil H. Cogan
Attorney for Petitioners
Counsel of Record
Storey Hall (SMU)
3315 Daniel Avenue
Dallas, Texas 75275
214-692-2579

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's decision in *DeShaney v. Winnebago County D.S.S.*, relieve a State official of a due process duty to prevent harm to a child and a due process duty not to inflict harm upon a child,

   a. where the child is in the *permanent* custody of the State offical and is intentionally or recklessly placed into a *new* and dangerous *permanent* custody; or

   b. where the child has State and federal entitlements to medical care and protection from physical harm, and is intentionally or recklessly placed into a new permanent custody where the child is deprived of medical care and protection from physical harm?

2. Do an adopted child and its adoptive family state a claim under the Due Process Clause where a State official induces the adoption by intentional or reckless withholding of knowledge that the child has suffered child abuse, causing the child to go without treatment and suffer severe mental injury and causing the family to incur injury to their persons, their resources and their relationships?

This petition is filed by Susan and Reggie Griffith, on behalf of themselves and on behalf of their children, Cynthia, Geoffrey,

3. Does this Court's decision in *Torres v. Oakland Scavenger Co.*, construing Ruel 3(c) of the Federal Rules of Appellate Procedure, mean that a Notice of Appeal is deficient if it states that "Plaintiffs" take the appeal and if counsel who represents all the Plaintiffs signs the Notice and, in addition, files a Notice of Appearance listing the Plaintiffs by name?

(footnote cont'd)

Anthony, Melanie and Davarris; Bonnie and Jim Harlow, on behalf of themselves and on behalf of their children, Chris, Jody, Asher and Rosalie; Cheryl and Rev. Bob Chandler, on behalf of themselves and on behalf of their adopted child, Tina; Adoptive Parents A and B, on behalf of themselves and on behalf of their Adopted Children A, B, C and D; Adoptive Parents E and F, on behalf of themselves and on behalf of their Adopted Children E, F and G; Adoptive Parents H and I, on behalf of themselves and on behalf of their Adoptive Child H; and each of the above parties on behalf of parents and children similarly situated.

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No. 90-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

SUSAN and REGGIE GRIFFITH,
on behalf of themselves and on behalf of their children,
CYNTHIA, GEOFFREY, ANTHONY, MELANIE and DAVARRIS;
BONNIE and JIM HARLOW,
on behalf of themselves and on behalf of their children,
CHRIS, JODY, ASHER and ROSALIE;
CHERYL and REV. BOB CHANDLER,
on behalf of themselves and on behalf of their child, TINA;
ADOPTIVE PARENTS A and B
on behalf of themselves and on behalf of their children,
ADOPTED CHILDREN A, B, C and D;
ADOPTIVE PARENTS E and F,
on behalf of themselves and on behalf of their children,
ADOPTED CHILDREN E, F and G;
ADOPTIVE PARENTS H and I,
on behalf of themselves and on behalf of their child,
ADOPTED CHILD H;
and each of the above parties
on behalf of parents and children
similarly situated,

Petitioners,

v.

MARLIN JOHNSTON, Individually
and as Commissioner of the Texas Department
of Human Services,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

Petitioners Susan and Reggie Griffith, et al., respectfully petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 899 F. 2d 1427 (1990). See pp. 5a-38a. The opinion of the district court is unreported. See pp. 39a-51a.

JURISDICTION

Jurisdiction is founded upon 28 U.S.C. 1254(1). The judgment of the Court of Appeals was entered May 4, 1990, see p. 1a, and rehearing was denied on May 30, 1990. See p. 3a. On August 16, 1990, Mr. Justice WHITE granted an extension of time in which to file a petition for a writ of certiorari until September 27, 1990.

PROVISIONS INVOLVED

The Fourteenth Amendment provides in part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .

Rule 3(c) of the Federal Rules of Appellate Procedure provides:

> The notice of appeal shall specify the party or parties taking the appeal. . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE[1]

In the late 1970's through at least 1983, the Commissioner of the Texas Department of Human Services directed a program, assertedly, to reduce expenditures in his Department by removing from his facilities abused and medically needy children who were in his permanent custody and who were entitled under Texas and federal law to medical care and protection from physical harm. The key to the program was the directive to withhold from prospective adoptive parents the fact and the extent of the children's abuse and medical need. See Complaint, paras. 15-24, pp. 56a-59a.

By 1983, the Commissioner had induced a group of adoptive parents to adopt nine young children without knowledge of their history of abuse and medical need and without knowledge of their need for immediate and long-term treatment. See Complaint, paras. 3-5, 19, pp. 53a-54a, 57a-58a. When the children began to manifest psychological and medical problems, the Commissioner refused to supply information

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1. With all due respect to the opinion of the Hon. Edith Jones, the "Texas Adoption Program" that she describes, see pp. 9a-14a, is a program that was not put in place until 1986 at the earliest, *after* at least nine of the ten adoptions which are the subject of dispute. See Complaint, paras. 3-5, pp.53a-54a. Most of what Judge Jones describes at the "Texas Adoption Program" was put into place in 1989, as a result of the efforts of the undersigned counsel and in response to the decision of the district court in this case. See Solender, *Symposium 1990, Family Code Chapter 16, Adoption*, 21 Tex. Tech. L. Rev. --, -- n. 17 (1990) ("[t]he changes in the statute were submitted by the attorney for the plaintiffs in Griffith v. Johnston . . . .").

The Statement of the Case is based upon the allegations of the Complaint, which must be assumed as true on this review of a F.R.Civ. P. 12(b) (6) dismissal.

or records about the children's history and refused to provide any services to the parents or children. See Complaint, paras. 34-35, 38-39, pp.61a-62a. As a direct result of the lack of information and the lack of treatment, the children suffered serious psychological and medical injury, and required intensive treatment, including institutionalization for some. See Complaint, para. 22, p.58a. As a direct result, too, the parents suffered injury to family relationships and resources. See Complaint, paras. 22-23, pp. 58a-59a.

In 1988, the adoptive parents and adopted children brought this suit in equity against the Commissioner, asserting that he violated due process by depriving the parents and children of protected liberty and property interests. The consistent gravamen of the claims was that the Commissioner's program to induce adoption by intentional or reckless withholding of information about the fact or extent of abuse (a) placed the children in danger and caused them injury by denying their parents the opportunity to give them early treatment and prevent the children's mental illnesses and institutionalization; (b) deprived the children of the benefits they would have had from the Commissioner, had the parents not adopted them without support;[2] and (c) injured the parents by placing in their households children who became disruptive, without giving the parents the opportunity of preventing such conduct. See Complaint, paras.

2. Under Texas law, for example, children are entitled to treatment for illnesses while under the managing conservatorship, or permanent custody, of the Commissioner. See *Chapa v. State*, 747 S.W. 2d 561 (Tex. App. -- Amarillo 1988, writ ref'd).

18, 21-23, 34-35, 38-39, pp.57a-59a, 61a-62a; Plaintiffs' Brief in Opposition to Motion to Dismiss, No. CA3-88-1211-H (N.D. Tex.), p. 9 (the Commissioner interfered with liberty interests "by placing in [the] home children who attack and threaten siblings and parents, destroy property within the home, and disrupt the marriage relationship . . ."); Brief for Appellants, No. 88-7008 (5th Cir.), p. 17 ("the Commissioner's program affirmatively injured [the parents] by placing in their homes children who physically attacked other children in the home or the parents themselves [and] destroyed property in the home . . .").

As a *remedy* for the injuries to their constitutional rights, the parents and children sought services for those adopted children who went uncared for as a result of the program, services to restore the children to the situation in which they would have been but for the program; and they sought disclosure of the Commissioner's files for each adopted child, to enable professionals to properly treat and care for the children. See Complaint, pp. 65a-66a. This latter request was mooted when the Texas Legislature, in 1989, responded to this suit by statutorily requiring that the Commissioner give adoptive parents the record of their adopted children. See n. 1 *supra*.

The district court dismissed the due process claims, holding that neither the children nor the parents had any liberty or property interests affected by the Commissioner's program. See Op., pp. 42a-47a.

The court of appeals affirmed. The court held that the parents and children "will receive due process protection only if their asserted interests are 'fundamental' in the constitutional sense, or if they have been deprived of property interests under state law." Op., p. 26a. The court held further that none of the parents' claims of injury to property or family relationships affected a fundamental interest. See Op., 26a-31a, 34a-36a.[3] Finally, relying heavily upon the holding and implications of *DeShaney v. Winnebago Co. D.S.S.*, 109 S. Ct. 998 (1989), the court held that whatever interests in liberty and interests in benefits the children had in the Commissioner's custody, those interests "lapsed" when the parents adopted the children, and the Commissioner ceased to have any duty to the children. See Op., pp. 31a-34a.

With respect to jurisdiction, the court held that it had appellate jurisdiction over only one family among the Plaintiffs. While the body of the Notice of Appeal specified that "Plaintiffs" appealed, the court held that the appeal was limited to the family specified in the caption of the Notice. See Op., pp. 6a-8a. On the Petition for Rehearing, Plaintiffs submitted that counsel's Notice of Appearance specified the families whom he represented on the appeal. The court denied rehearing.

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3. Without any support in this 12(b) (6) record, the court of appeals assumed that what is the case under current law, was the case in the late 1970's and early 1980's when the adoptions occurred, see n. 1 *supra*, namely, that the families knew they were adopting "hard-to-place children and could have anticipated that the expenses to care for these children would exceed those for a normal child." Op., 36a.

ARGUMENT

I. AFTER *DESHANEY*, THE CIRCUITS HAVE BEEN IN CONFLICT WHETHER CUSTODY IS PREREQUISITE TO A DUE PROCESS DUTY TO PREVENT HARM AND TO A DUE PROCESS DUTY NOT TO INFLICT HARM

Since this Court's decision in *DeShaney v. Winnebago County D.S.S.*, 109 S. Ct. 998 (1989), the courts of appeals have been in conflict about whether custody is a prerequisite to a State official's due process duties to prevent harm to a person and not to inflict harm upon a person. Petitioners' case is a good vehicle for resolving the conflict.

A. *Conflict Among the Courts of Appeals*

The decision of the court below is at one end of a line of conflicting decisions, each of which discusses the pertinence of "custody" to protected liberty and property interests under the Due Process Clause.

The court below read *DeShaney* as holding that unless a person is in the custody of a State official, the State official has no duty to prevent harm and no duty not to inflict harm. Without custody, the court said, the person has no "liberty interests" under the Due Process Clause. See pp. 31a-34a. Thus, no matter what the State official did to the Petitioner children -- whether he placed them in danger by withdrawing an entitlement to services, or inflicted harm on them by withholding data vital to their treatment and mental health -- the children had no claim, because upon transfer to their adoptive

parents their "'liberty interest' . . . lapsed . . . ." See 34a.

Next in line are decisions of three courts of appeals, the Second, Sixth and Eleventh, which have held that a State official has a duty to prevent harm to children placed in the custody of private foster parents. See *Meador v. Cabinet for Human Resources*, 902 F. 2d 474 (6th Cir. 1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F. 2d 791 (11th Cir. 1987) (en banc), *cert. denied sub nom. Ledbetter v. Taylor*, 109 S. Ct. 1337 (1989); and *Doe v. New York City Dep't of Social Services*, 649 F. 2d 134, 141-42 (2d Cir. 1981), *after remand* 709 F. 2d 782, *cert. denied sub. nom. Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983).[4] In each decision, the courts of appeals recognized that a child in the permanent custody of a State official has a liberty interest protected by the Due Process Clause; that a transfer to the custody of private foster parents affects that interest; and that the State official has a due process duty to prevent harm being inflicted upon the child in its new custody.[5]

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4. The Fourth Circuit has intimated as well that State officials have duties to children placed in foster homes. See *Hampton v. Motley*, 1990 U.S. App. Lexis 14601, *7 (Aug. 22, 1990).

5. The court of appeals held that whatever liberty or property interests a child had in State-granted entitlements, those interests, "lapsed" upon its transfer to the adoptive setting. See p. 34a-35a. This decision is in conflict with the decisions in *Taylor* and *Meador*, *supra*, in which the Sixth and Eleventh Circuits held that children in foster settings had liberty interests in statutorily-guaranteed protections for personal safety. Because the adoptive parents asserted that they were falsely induced to adopt the children, the court of appeals' decision is in conflict with many

The court of appeals for the Third Circuit has similarly held that a police officer had a duty to prevent harm to a person whom he left in the "custody" of a private citizen for "interrogation." See *Horton v. Flenory*, 889 F. 2d 454, 458 (3rd Cir. 1989).

While a foster setting and the peculiar setting in *Horton* might be analogized to custody, the next decisions in line do not fit that analogy. Three courts of appeals (including one noted above), the Seventh, Eighth and Eleventh, have held that *DeShaney* does not limit due process duties to custodial settings only. See *Ross v. United States*, 1990 U.S. App. Lexis 14232, *32 (7th Cir., Aug. 16, 1990) (officer had duty not to delay another officer's rescue of a child);[6]

(footnote cont'd)

decisions holding that constitutionally-protected interests may not be waived by deception. See *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (Miranda rights may not be waived by trickery); *United States v. Robson*, 477 F. 2d 13, 17 (9th Cir. 1973) (Fourth Amendment rights may not be waived by deceit or trickery).

6 The court of appeals' decision in this case is in conflict as well with another Seventh Circuit decision. See *White v. Rochford*, 592 F. 2d 381 (7th Cir. 1979) ("police officers violated due process when, after arresting the guardian of three young children, they abandoned the children on a busy stretch of highway at night." Brennan, J., dissenting, at 109 S. Ct. 1008). The operative fact in *White* was the officers' placement of the children in a new and dangerous setting, breaching their duty not to inflict harm.

Freeman v. Ferguson, 1990 U.S. App. Lexis 13422, **3-7 (8th Cir., Aug. 6, 1990) (officer breached duty by interfering with protective services available to an abused woman); *Cornelius v. Town of Highland Lake, Ala.*, 880 F. 2d 348, 352-59 (11th Cir. 1989) (town officials had "special relationship" with a clerk whom they put in "special danger" by subjecting her to dangerous inmates).

A State official who places children for adoption has a far closer connection with those children than the officials had to their victims in the decisions described. The State official had the children in permanent custody and had both State and federal duties of care and protection to them. Surely, had the instant case arisen in the three courts of appeals noted above, the State official here would have had an affirmative duty to prevent harm to the children or, at least, not to affirmatively inflict harm.

This Court decided for the first time in *DeShaney* the due process rights of the unfortunate children caught up in the system that can terminate their biological parents' rights and place them in new temporary or permanent custody. Having done so, this Court should now further clarify the duties owed to these children and resolve the conflict that exists among the courts of appeals. This would be a positive development for the children, the agencies that deal with them, and the parents who adopt them.

B. *This Case is a Good Vehicle for Resolving the Conflict*

The issues in the instant case begin where *DeShaney v. Winnebago Co. D.S.S.* left off, and thus provide a good vehicle for resolving the conflict.

In *DeShaney*, Joshua was in the temporary custody of a State official and was returned to his parents' home. See 109 S. Ct. at 1001-02. In that circumstance, the Court held, the child was owed no duty by the official to prevent harm. See id. at 1006. CHIEF JUSTICE REHNQUIST said that the Court was not deciding the duty owed to a child in the *permanent* custody of a State official and transferred to a *new* custody in a foster home. See *id.* at 1006 n. 9. This case presents that next issue, in the context of a transfer to a *new permanent* custody in an adoptive home.

In *DeShaney*, there was no assertion that the State officials violated a duty not to inflict harm, only that they violated a duty not to prevent harm. See *id.* at 1002. Here, at each stage of the litigation, the children asserted that the State official recklessly or intentionally inflicted harm upon the children (and their adoptive parents) in order to save money for the State. See *id.* at 1012 (BLACKMUN, J., dissenting).

In *DeShaney*, the CHIEF JUSTICE said that the issue of whether Joshua was denied State entitlements to protective care was not presented. See *id.* at 1003 n. 2. Here, at each stage of the litigation, the children asserted that the State official transferred them to private custody *in order to* deny them State entitlements to medical care and reasonable safety and in disregard of whether they would receive similar benefits in private custody.

Thus, this case is not a repetition of *DeShaney*, but is rather an opportunity to compare and contrast that decision or, if the Court so decides, to extend that decision.

C. *The Court of Appeals' Decision is Erroneous*

With all due respect to the learned judges below, the court of appeals' decision is erroneous.

We submit that a State official violates protected liberty and property interests where the official induces the adoption of children through intentional or reckless withholding of information about their abuse, (a) causing injury to the children by denying their parents the opportunity to give them early treatment and prevent the children's mental illnesses and institutionalization; (b) causing injury to the children

by the loss of entitlements they would have had from the Commissioner, had the parents refused to adopt them without support; and (c) causing injury to the parents by placing in their households children who became assaultive and destructive, without giving the parents the opportunity to prevent such conduct.

We submit that the lynchpin upon which the court of appeals relied was the absence of "custody" which resulted from the parents' adoption of the children. Without that lynchpin, the court of appeals might have recognized that causing injury to property and person and causing the loss of entitlements, were plainly injuries to liberty and property interests.[7]

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7. We respectfully submit that the interests described in the text -- including the injuries to persons and property -- are "fundamental" interests. With all due respect to the court of appeals, nowhere did the parents argue that they had a fundamental right to adopt, and nowhere did the parents and children argue that they had a fundamental right to records or services. As noted in the text, see p. 6 *supra*, the parents and children sought services and records to remedy the illnesses resulting from the Commissioner's conduct.

We submit as well that the court of appeals was in error that only "fundamental" interests are protected liberty and property interests under the Due Process Clause. The parents and children argued consistently both in the district court and in the court of appeals that it was unnecessary to decide whether the interests at stake were "fundamental," because they were traditionally protected interests. See Brief in Opposition to Motion to Dismiss, No. CA3-88-1211-H (N.D.Tex), pp. 12-13; Brief for Appellant, No. 88-7008 (5th Cir.), pp. 14-15. Should the Court grant certiorari, we respectfully reserve the issue whether only "fundamental" interests are protected under the Due Process Clause.

The process of adoption is a greater, not a lesser, intrusion upon the liberty interests of a child than is a placement in a foster home. In both settings, the child has little, if any, choice in the matter of its transfer. But in the foster setting, the effect upon liberty interests may be temporary and may be more easily remedied. In the adoptive setting, however, the effect is more likely permanent and is far less easily remedied. In addition, the adoption process has a dramatically greater effect upon the liberty and property interests of the adoptive family than upon the foster family. While the Court might be understandably reluctant to delve very far into the adoptive setting, the initial transfer into a dangerous adoptive setting raises the identical concerns about liberty that a transfer into a dangerous foster setting raises.

The correct analysis of this case is that of the courts of appeals for the Seventh, Eighth and Eleventh Circuits. See cases, pp. 10-11 *supra*. Even were there no duty to prevent harm once the Commissioner ceased to be an operative factor, the Commissioner did have a due process duty not to inflict harm upon the children by his initial conduct.

II. THE CIRCUITS ARE IN CONFLICT IN INTERPRETING THIS COURT'S DECISION IN TORRES V. OAKLAND SCAVENGER CO.

The court of appeals held that a Notice of Appeal which stated that "Plaintiffs appeal" and which was signed by counsel for all Plaintiffs, did not comply with Federal Rule of Appellate Procedure 3(c)'s requirement that appellants be

specified. In so holding, the court of appeals held that it was following this Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

The court of appeals' decision is in accord with the decisions of four courts of appeals, each of which holds that the name of each appellant must appear in the Notice of Appeal. See *Cruz v. Melendez*, 902 F. 2d 232, 235-36 (3rd Cir. 1990); *Heussner v. National Gypsum Co.*, 887 F. 2d 672, 675 (6th Cir. 1989); *Baucher v. Eastern Indiana Production Credit Ass'n*, 906 F. 2d 332, 333-34 (7th Cir. 1990); *Mayeske v. Int'l Ass'n of Fire Fighters*, 905 F. 2d 1548, 1549 (D.C. Cir. 1990). However, the court of appeals' decision is also in conflict with the decisions of the courts of appeals for the Second and Ninth Circuits. The Second Circuit has held that a Notice of Appeal stating that "all of the Plaintiffs" appeal satisfies Rule 3(c). See *Baylis v. Marriott Corp.*, 906 F. 2d 874, 877 (2d Cir. 1990). The Ninth Circuit has held that a Notice of Appeal stating that "Defendants" appeal likewise satisfies the rule. See *National Center for Immigrants' Rights v. I.N.S.*, 892 F. 2d 814, 816-17 (1989).

With all due respect, five courts of appeals have read far too much into this Court's decision in *Torres*. In that decision, this Court held that where fifteen appellants were specified, but a sixteenth omitted, the sixteenth did not appeal. The Court did not hold, as five courts have now held, that an effective Notice of Appeal must list each party appealing even if there is an adequate specification, such as the generic use of "Plaintiffs appeal" or "Defendants appeal."

A Notice of Appeal which specifies that "Plaintiffs appeal" satisfies that purpose of Rule 3(c), namely, to give adequate notice of who is appealing. To hold otherwise violates Rule 3(c)'s admonition that a Notice of Appeal shall not be dismissed for "informality."

Here, all Plaintiffs were represented by one counsel. Here, counsel signed the Notice of Appeal on behalf of Plaintiffs. Here, counsel in his Appearance listed by name the Plaintiffs he represented. Surely, there was no confusion on anyone's part, court or counsel, as to who was appealing. At most, there was nonprejudicial informality.

The rule followed by the five courts of appeals is a rule that should be considered by the Advisory Committee and then, if appropriate, proposed by the Court, subject to Congressional review. It is not a rule that comports with the intent and spirit of, and the practice under, Rule 3(c), as it has been understood.

CONCLUSION

Petitioners respectfully request that this Court grant a writ of certiorari to the Court of Appeals for the Fifth Circuit and reverse the judgment of that Court in this case.

Respectfully submitted,

Neil H. Cogan
Attorney for Petitioners
Counsel of Record
Storey Hall (SMU)
3315 Daniel Avenue
Dallas, Texas 75275
214-692-2579

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-7008

D.C. Docket No. CA 3 88 1211 H

SUSAN and REGGIE GRIFFITH, et al.,
Plaintiffs-Appellants

versus

MARLIN JOHNSTON, Individually
and as Commissioner of the Texas
Department of Human Services,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas.

May 4, 1990

JUDGMENT

Before GEE, JONES, and SMITH, Circuit Judges.

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to the defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-7008

SUSAN and REGGIE GRIFFITH, et al.,
Plaintiffs-Appellants,

versus

MARLIN JOHNSTON, Individually
and as Commissioner of the Texas
Department of Human Services,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 5-4-90, 5 Cir., 198__, _____F.2d___)

May 30, 1990

Before GEE, JONES and SMITH, Circuit Judge

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is Denied.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
5/25/90
s/Edith H. Jones - 5/25/90
United States Circuit Judge

*Clerk's Note: See FRAP and Local Rules 41 for stay of the mandate.
REHG-6

APPENDIX C

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

No. 88-7008
SUSAN and REGGIE GRIFFITH, et al.,
Plaintiffs-Appellants,

versus

MARLIN JOHNSTON, Individually
and as Commissioner of the Texas
Department of Human Services,
Defendant-Appellee

Appeals from the United States District Court for the Northern District of Texas.

May 4, 1990

Before GEE, JONES and SMITH, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Eighteen adopted children and their twelve adoptive parents filed this civil rights action against the Texas Department of Human Service ("TDHS"), alleging that Texas' administration of its adoption program for "Hard-to-Place" children violated their constitutional

rights to Due Process and Equal Protection. These complainants also raised several claims under the Adoption Assistance Act, 42 U.S.C. § 673. Concluding that the litigants failed to state a claim upon which relief could be granted, the district court dismissed the constitutional allegations without prejudice, retained the statutory claims for further proceedings, and entered final judgment pursuant to Fed. Rule Civ. Pro. 54(b). The Griffiths appealed. Finding that appellants did not allege a constitutionally sufficient liberty or property interest abridged by the TDHS, we affirm.

I.

NOTICE OF APPEAL

Before discussing the merits of this appeal, we must determine whether we have jurisdiction over these allegations. Although none of the parties have questioned our jurisdiction, it is the duty of this court to determine, *sua sponte* whether it has jurisdiction over any case before. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541-42, 106 S.Ct. 1326, 1331, 89 S.Ct. 501 (1986); *Spiess v. C. Itoh & Co. (America), Inc.*, 725 F.2d 970, 971 (5th Cir.) *cert. den.* 469 U.S. 829, 105 S.Ct. 115, 83 L.Ed.2d 58 (1984); *Matter of Kutner*, 656 F.2d 1107, 1110 (5th Cir. 1981) *cert. den.*, 455 U.S. 945, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982).

Both the appellants and the appellees treat this action as an appeal on behalf of all plaintiffs from the district court dismissal. However, the appellants styled their notice of appeal

"Susan and Reggie Griffith, et al.", omitting the names of the other plaintiffs from the filing. The Supreme Court has held that the use of the phrase "et al." fails to provide the required notice of appeal to the opposing parties or to the court, since this designation does not identify all appealing parties. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 2409, 101 L.Ed. 2d 285 (1988); *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127, 129 (5th Cir. 1989). Fed. Rule App. Pro 3(c).

When interpreting the *Torres* decision, the Fifth Circuit has recognized four situations where the "et al." designation will suffice for purposes of this notice requirement. If only two parties filed suit in the district court, the "et al." designation clearly refers to the unnamed party. *Pope*, 872 F.2d at 129. Similarly, where the notice of appeal lists only the named plaintiff in a class action, the "et al." designation adequately identifies the remaining members of the class. *Rendon v. AT & T Technologies*, 883 F.2d 388, 398 n. 8 (5th Cir. 1989). If parents sue on their own behalf and on behalf of their children, the "et al." designation preserves the children's appeal, since the opposing party could anticipate that the parent would appeal in both their individual and representative capacities. *King v Otasco, Inc.*, 861 F.2d 438, 443 (5th Cir. 1988). Finally, where the notice of appeal defectively employs the "et al." designation, but where, within the 30 day deadline, plaintiffs file a "Memorandum in Support of Appellants' Motion for Injunction Pending Appeal" listing all plaintiffs to the original action, plaintiffs will have

cured the original defect preserving all parties' rights to appeal. *Brotherhood of Railway Carmen v Atchison, Topeka & Santa Fe Railway Co.*, 894 F.2d 1463, 1465 (5th Cir. 1990).

These exceptions do not assist the plaintiffs. Since more than one plaintiff besides the Griffith family filed suit in the district court, "et al." does not clearly designate only one remaining appellant. The district court never certified this case as a case action, and never appointed the Griffiths as the class representatives. See *Torres*, 108 S.Ct. at 2409; *Rendon*, 883 F.2d at 398 n. 8; *King*, 861 F.2d at 443. Plaintiffs never cured their defective notice of appeal within the 30 day deadline by filing a document listing all appealing plaintiffs. Under *King*, the "et al." designation does preserve the rights of the five Griffith children to appeal because their parents sued in both an individual and a representative capacity. However, as to all plaintiffs besides Susan and Reggie Griffith and their children, plaintiff filed a defective notice of appeal.

Compliance with this notice requirement is a jurisdictional prerequisite. *Torres*, 108 S.Ct. at 2409; *Barnett v. Petro-Tex Chemical Corp.*, 893 F.2d 800, 805 (5th Cir. 1990); *Smith v. White*, 857 F.2d 1042, 1043 (5th Cir. 1988). An appellate court lacks jurisdiction over an intended appeal by parties other than those named in the notice. *Barnett*, 893 F.2d at 805. Consequently, we have no jurisdiction to address the merits of any claim besides those raised by the Griffiths on their own behalf and on behalf of their five children.

II.

TEXAS ADOPTION PROGRAM

In order to adequately scrutinize the Griffiths' allegations, it is important to understand Texas' statutory framework regulating the supervision the placement of children.

Appellee Marlin Johnston is the Commissioner of the Texas Department of Human Services (TDHS), a state-created agency designed to implement Texas' human welfare programs. Tex. Hum. Res. Cod Ann. §§ 21.004, 22.001 (Vernon 1980 and Vernon Supp. 1990). Commissioner Johnston exercises all rights, powers, and duties conferred by law on the department, unless the legislature delegates the duty to the Texas Board of Human Resources. Tex. Hum. Res. Code Ann. § 21.004(a) (Vernon Supp. 1990). The Board appoints the commissioner, and adopts policies and rules to govern the department's activities. Tex. Hum. Res. Code Ann. §§ 21.003(a), 21.004(b) (Vernon Supp. 1990).

Among the many duties carried out by TDHS, the department "promote[s] the enforcement of all laws for the protection of dependent, neglected, and delinquent children and children who have no presumed father." Tex. Hum. Res. Code Ann. § 41.001 (Vernon Supp. 1990). This mandate authorizes TDHS to bring a suit in state court to terminate the natural parent-child relationship, and to have the state appointed as managing conservator for the child. 2 Tex. Fam. Code Ann. §§ 11.01 et seq., § 15.02, § 15.05(b), § 14.01(a), (c) (Vernon 1986 and Vernon Sup. 1990).

Where a court has appointed Texas as managing conservator, the state must provide the child with "clothing, food, shelter and education," as well as "care, control, protection, moral and religious training, and reasonable discipline." 2 Tex. Fam. Code Ann § 14.02(b) (Vernon 1986 and Vernon Supp. 1990). The statute also empowers the state to consent to "medical, psychiatric, and surgical treatment" on behalf of the child. 2 Tex. Fam. Code Ann § 14.02(b)(5) (Vernon 1986 and Vernon Supp. 1990). The state may employ and fund foster care as a temporary means to effectuate these statutory obligations. Tex. Hum. Res. Code Ann. § 41.021 (Vernon 1980 and Supp. 1990); 2 Tex. Fam. Code Ann. §§ 18.01 et seq. (Vernon 1986 and Supp. 1990).

Texas may also consent to the adoption of these children, after determining that the adoptive home fulfills the child's particular needs. 2 Tex. Fam. Code Ann. § 14.02(b)(8) (Vernon 1986 and Vernon Supp. 1990); 4-81 Texas Department of Human Resources, Minimal Standards For Child Placing Agencies § 5300. Besides its traditional adoption programs, Texas administers a system "designed to promote the adoption of hard to-place children." Tex. Hum. Res. Code Ann. § 47.002(Vernon 1980). This program provides hard-to-place children who reside in foster homes at state or county expense with stable and secure permanent homes, while potentially reducing the costs paid by the state for foster care. Tex. Hum. Res. Code Ann. §47.002 (Vernon 1980).

Hard-to-place children include those who are three years old or older, those who are difficult to place because of "age, race, color, ethnic background, language, or physical, mental, or emotional handicap," or those who are members of a sibling group that should be placed in the same home. Tex. Hum. Res. Code Ann. § 47.001 (Vernon Supp. 1990). To encourage adoption of these children, Texas informs prospective adoptive parents about their availability, assists the adoptive parents with the adoption process, and provides financial support to parents including medical fees, and maintenance fees up to the cost of foster care. Adoptive parents might also qualify for adoption assistance under the Federal Adoption Assistance Act. 42 U.S.C. § 673(c).

Before placing a child for adoption under any program, TDHS must compile a report concerning the "health, social, educational and genetic history of the child to be adopted," as well as "any history of physical, sexual or emotional abuse." 2 Tex. Fam. Code Ann. § 16.032(a)-(e) (Vernon Supp. 1990). The prospective adoptive parents and the court reviewing the adoption must receive a copy of this report "edited to protect the identity of the birth parents and their families." The state must also inform the parents of their right to examine all records and other information related to the history of the child. 2 Tex. Fam. Code Ann. §§ 16.032(a)-(e), (n), § 16.09, § 34.08 (Vernon Supp. 1990). Any parents who adopted children before the effective date of this act may receive copies of this information from the state. 2 Tex. Fam. Code

Ann. § 16.032 (Vernon Supp. 1990).[1]

Along with these legislative requirements, TDHS has formulated its own "management policies" to instruct staff members about how to handle adoptions. Before the adoptive parents meet the child, TDHS personnel must "discuss with the parents *all* information contained in the child's adoptive readiness study." 86-2 Texas Dept. of Human Services, Child Protective Services Handbook §§ 6930-31 (March, 1986). This information includes all available medical data, all known hereditary conditions, the existence and significance of handicaps, and the need for medical and psychological treatment. Child Protective Services Handbook at §§ 6930-31; 4-81 Texas Department of Human Resources, Minimal Standards For Child Placing Agencies § 5300(5). Where the child is handicapped or receiving therapy, the worker must encourage the parents to talk with the child's physician or therapist "to understand the implications of the child's condition. Child Protective Services Handbook at §§ 6930-31. TDHS staff members must also "[h]elp the family resolve fears and concerns they have about the child, the child's background, the placement, and their ability to parent the child." *Id.* at § 6931.

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1. Between 1984 and this amendment to the statute in 1989, TDHS was not required to reveal information about child abuse in this report. Further, adoptive parents received only a *summary* of the report, edited to protect the *confidentiality* of the birth family, rather than a *copy* edited to protect the family's *identity*. 2 Tex. Fam. Code Ann § 16.032 (Vernon 1986).

At the time of adoption, the staff worker gives the parents the child's medical records, as well as the written report compiled by TDHS pursuant to state statute. *Id.* at § 6933; Minimal Standards For Child Placing Agencies at § 5300(5). The staff worker must also determine whether the family qualifies for any post-adoption services, including "financial assistance, respite care, placement services, parenting programs, support groups, counseling services, and medical aid." Tex. Hum. Res. Code Ann. §§ 47.031-47.032 (Vernon Supp. 1990). Any post-adoption plan must identify "services needed by the child and family, possible sources for securing the services," and appropriate disciplinary methods to be used, depending upon the child's disciplinary needs. 86-2 Texas Dept. of Human Services Child Protective Services Handbook § 6935 (March 1986).

After the adoption, TDHS must monitor the placement for a minimum of six months to ensure that the placement adequately meets the child's requirements. If "the placement is unsatisfactory," TDHS must remove the child from the adoptive home. Minimal Standards For Child Placing Agencies at § 5400(1).

Although TDHS consents to, facilitates and monitors placements via these guidelines, state courts perform the ultimate review of the adoption before issuing the adoption decree. 2 Tex. Fam. Code Ann. § 16.08 (Vernon 1986). In scrutinizing the placement, the court must satisfy itself that the statutory requirements for adoption have been met, and that the adoption

is in the best interests of the child. Id.; *Green v. Remling*, 608 S.W.2d 905, 908 (Tex. 1980); *Davis v. Collins*, 147 Tex. 418, 216 S.W.2d 807 (1949); *Hursey v. Thompson*, 141 Tex. 519, 174 S.W.2d 317 (1943); *Hopper v. Brittain*, 612 S.W.2d 636 (Tex. Civ. App. 1981). The trial court is "invested with broad discretionary power in determining the best interests of the children." *In re W.E.R.*, 669 S.W.2d 716 (Tex. 1984); *Green*, 608 S.W.2d at 908. Thus, both TDHS and Texas state courts implement the adoption system mandated by the Texas legislature, to ensure that all adoptions fulfill the needs of the adoptive families and their adopted children.

III

BACKGROUND

Despite these extensive statutory safeguards and the comprehensive review available at several stages in Texas' adoption system, appellants allege that TDHS violated their Due Process and Equal Protection rights by failing to release information to the adoptive parents regarding the children's backgrounds and by failing to provide adequate services to the adopted children. When reviewing a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6),[2] we must accept all of the plaintiffs' well pleaded facts as true and view them in the light most favorable to the plaintiffs. *Carpenters Local v Pratt-Farnsworth*, 690 F.2d 489, 500 (5th Cir. 1982) *cert. den.* 464 U.S. 923, 104

[Footnote 2 on next page.]

S.Ct. 335, 78 L.Ed. 2d 305 (1983); *Dike v School Board*, 650 F.2d 783, 784 (5th Cir. 1981). We cannot affirm the district court "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Pratt-Farnsworth*, 690 F.2d at 500; *Ware at Associated Milk Producers, Inc.*, 614 F.2d 413, 415 (5th Cir. 1980).

The tangled procedural posture of this case, when combined with the plaintiffs' generalized pleading, complicates our review under this standard. In their original complaint as well as in their numerous briefs filed at varying stages, plaintiffs failed to connect their factual

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2. Appellees contend that because they submitted affidavits in conjunction with their 12(b)(6) motion to dismiss for failure to state a claim, the district court should have treated that motion as a rule 56 motion for summary judgment. We reject his argument.

Rule 12(b)(6) permits the district court, in its discretion, to consider materials outside the pleadings when adjudicating the motion to dismiss, thereby converting the motion into one for summary judgment. However, where the wording of the district court's order clearly indicates that the court did not consider any "extra-pleading" matters, the appellate court must treat the decision as one under Rule 12(b)(6). *Rutherford v. United States*, 702 F.2d 580, 581 n. 1 (5th Cir. 1983); *Ware v. Associated Milk Producers Inc.*, 614 F.2d 413, 414-15 (5th Cir. 1980). Further, when a 12(b)(6) motion is converted into one for summary judgment, the district court must provide notice to the parties. *Clark v. Tarrant County*, 798 F.2d 736, 745 (5th Cir. 1986)

In this case, the District Court clearly dismissed appellant's claims "without prejudice for failure to state a claim upon which relief could be granted." The district court did not notify either party that it intended to construe this motion as one for summary judgment. Consequently, we will treat this as a 12(b)(6) dismissal.

allegations to particular plaintiffs.[3] Only the Griffiths appear before us on this appeal. Consequently, we must look to their specific contentions to ascertain whether their complaint has any merit. However, we cannot disentangle the allegations which apply directly to the Griffiths from those allegations implicating other plaintiffs. Since we conclude that none of these allegations are sufficient to state a cause of action under 42 U.S.C. § 1983, we will assume that all generalized pleadings apply to the appellants. Employing these standards, the Griffiths' complaint reveals the following facts.

Between 1976 and 1982, the Griffiths adopted five children from the Texas Department of Human Services. TDHS had terminated the natural parents' rights to these children and had acted as managing conservator before making these permanent placements.

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3. Along with not attaching allegations to specific plaintiffs, the complaint also fails to plead factual details including when the alleged deprivations occurred, who perpetrated the deprivations, and exactly what the responsible individuals(s) did to violate plaintiffs' rights. While federal pleading rules permit notice pleading, this circuit has consistently advocated the better practice of pleading specific facts rather than conclusory allegations in cases under 42 U.S.C. § 1983. *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986); *Morrison v. City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985); *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). Particularly when the complaint relies upon a specific constitutional provision, we have found the pleadings insufficient to give adequate notice where those pleadings merely cite the relevant provision and plead legal conclusions to support the claims. *Hanson v. Town of Flower Mound*, 679 F.2d 497, 504 (5th Cir. 1982). Since plaintiffs' complaint frequently relies on vague generalities and legal conclusions to plead this cause of action, appellants' complaint borders on legal insufficiency.

The children were categorized as "hard-to-place" or "special needs" children. Complaint, ¶ 16. The Griffiths believe that their children might have been physically, sexually, and emotionally abused by their biological parents, or at least that the biological parents failed to care for the children's handicaps and medical needs. Complaint, ¶ 17. The Griffiths further allege that several policies and practices followed by TDHS prevented the agency from learning about these problems and from communicating these problems to the parents.

While TDHS had custody and control of the Griffith children, TDHS intentionally or recklessly failed to hire "psychologists and similar personnel who have training and competence regarding problems peculiar to children with special needs". Complaint, ¶¶ 26-27. The psychologists whom TDHS did employ were not "competent to learn and communicate the information essential for parents to make informed adoption decisions" and to provide minimally adequate care for their children. Complaint, ¶ 26, TDHS employed deficient personnel in order to avoid paying the salary of specially trained psychologists. Complaint, ¶ 27.

During the adoption phase of the program, the Griffiths contend that TDHS withheld "many of the facts essential to the *care and treatment* of children with special needs--including facts about the existence or extent of physical, sexual and emotional abuse; mental and physical handicaps and medical needs of the children; and other vital information, such as the social,

genetic and medical history of the biological parents and the children's siblings." (emphasis added) Complaint, ¶ 19. TDHS followed this practice despite the comprehensive statutory and regulatory structure requiring disclosure of medical and psychological information, and with reckless disregard for the interests of the children and the adoptive parents. TDHS resorted to this "policy" in order to induce the adoption of special-needs children. Complaint ¶ 20.

TDHS also failed to provide sufficient assistance to the Griffiths during the post-placement and post-adoption period. TDHS neglected to train social workers and similar personnel to provide post-adoption services. Complaint, ¶ 30. TDHS also declined to instruct the Griffiths about how to care adequately for their children. *Id.* Finally, TDHS intentionally elected not to provide post-adoption services for these children, even though the agency served children in TDHS custody, contending that adoption terminated TDHS' obligations. Complaint, ¶ 34. The Griffiths believe that TDHS sought to cut its administrative cost by withholding training and services. Complaint, ¶¶ 31, 35, 39.

These "policies and practices" allegedly injured the Griffiths in several ways. In order to make an informed decision about whether to adopt their children, the parents required facts about the abuses suffered by the children and about the children's handicaps and medical needs. Complaint, ¶ 18. Without this information the Griffiths also could not provide "the kind of care and treatment that was and is at

least minimally adequate." *Id.* The parents commenced medical and psychological treatment only after the children's problems became evident during the children's pre-teen and teen years.

By this time, some of the adopted children had attacked parents and siblings with lethal weapons, destroyed or threatened property within the home, and committed other criminal acts against the community. Plaintiff's Brief in Opposition to Motion at R. 103. The delay in treatment traumatized the children and increased the financial burden borne by the parents. Complaint, ¶¶ 21-23. Some of the children have been institutionalized in public or private residential treatment centers and psychiatric institutions at the cost of tens of thousands of dollars per month. Complaint, ¶ 22.

Since the Commissioner "knew or should have known that these injuries would occur, and acted recklessly or intentionally toward the parents and children in causing them to occur," appellants conclude that the Commissioner violated appellants' constitutional rights. As a remedy for these injuries, appellants ask the Commissioner to disclose the adopted children's files to facilitate adequate professional care for the children.[4] The Griffiths also request that Texas provide services for the children, to raise the children to the level that they would have

4. In their reply brief, Appellants concede that a Texas law enacted in 1989 moots this request by specifically codifying adoptive parents' rights to receive a history of the adoptees.

attained but for the Commissioner's policies, and to equalize Texas' treatment of special needs children in and out of state custody.

We must decide whether the Griffiths' factual allegations state a cause of action for relief under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

IV

DUE PROCESS

The Due Process Clause provides "nor shall any state deprive a person of life, liberty or property without due process of law." In order to state a cause of action for violation of the Due Process Clause under Section 1983, the appellants must show that they have asserted a recognized "liberty or property" interest within the purview of the Fourteenth Amendment, *Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S. Ct. 2701, 2706, 33 L.Ed.2d 548 (1972): *Neuwirth v. Louisiana State Board of Dentistry*, 845 F.2d 553, 557 (5th Cir. 1988); *Phillips v. Vandygriff*, 711 F.2d 1217, 1221 (5th Cir. 1983) *cert. den.* 469 U.S. 821, 105 S.Ct. 94, 83 L.Ed.2d 40 (1984); and that they were intentionally or recklessly deprived of that interest, even temporarily, under color of state law, *Daniels v. Williams*, 474 U.S. 327, 327, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986). *Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986). *Brantley v. Surles*, 718 F.2d 1354, 1357 (5th Cir. 1983). The Supreme Court has expanded the definition of "liberty"

beyond the core textual meaning of that term to include interests arising from the specific privileges enumerated by the Bill of Rights and the "fundamental rights implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition" under the Due Process Clause. *See Michael H. v Gerald D.*,--U.S.--,109 S.Ct. 2333, 2341, 105 L.Ed.2d 91 (1989)(Scalia, J.); *Bowers v. Hardwick*, 478 U.S. 186, 191, 106 S.Ct. 2841, 2844, 92 L.Ed.2d 140 (1986); *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983); *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531 (1977).

Under traditional notions of Due Process, the fourteenth amendment was "intended to secure the individual from the *arbitrary exercise* of the powers of government." which resulted in "grievous losses" for the individual. (emphasis added). *Kentucky Dept. of Corrections v. Thompson*,---U.S.---, 109 S.Ct. 1904, 1909, 104 L.Ed.2d 506 (1989); *Wolff v McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41, L.Ed.2d 935 (1974). However, not every "grievous loss" implicates constitutional concerns. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). *See Jago v. Van Curen*, 454 U.S. 14, 17, 102 S.Ct. 31, 34, 70 L.Ed.2d 13 (1981). *Meachum v. Fano*, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976). Courts must resist the temptation to augment the substantive reach of the Fourteenth Amendment, "particularly if it requires redefining the category of rights deemed to be

fundamental". *Michael H.*, --U.S. at ---, 109 S.Ct. at 2341; Hardwick, 478 U.S. at 194-95, 106 S.Ct. at 2846. As Justice White cautioned:

> That the court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including [the Supreme] Court is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of Framers, . . . the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

Moore, 431 U.S. at 544, 97 S.Ct. at 1958 (White, J. dissenting). *See Michael H.*, --U.S.---, 109 S.Ct. at 2341 (Scalia, J., plurality opinion); *Hardwick*, 478 U.S. at 194-95, 106 S.Ct. at 2846.

Appellants allege that they suffered physical, emotional and monetary injuries at the hands of TDHS. Their contentions resemble tort claims for negligence and misrepresentation. We may not, however, animate every traditional tort cause of action with constitutional significance. Section 1983 imposes liability for deprivations of constitutionally protected rights, rather than for violations of tort duties of care. *Daniels*, 474 U.S. at 332-33, 106 S.Ct. at 665-66' *Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979). *See DeShaney v Winnebago County DSS*,---U.S.---, 109 S.Ct. 998, 1006-7, 103 L.Ed.2d 249 (1989); *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976).

Bearing in mind these interpretive principles, we shall try to ascertain whether the appellants' tort-like allegations also embody interests or a deprivation which merits constitutional scrutiny.

1. *Appellants' Complaint.*

Appellants have hindered our review by repeatedly recharacterizing the nature of their asserted rights. The original complaint alleged that "special needs" children have a liberty interest in "the kind of care and treatment (from the state) that was and is at least minimally adequate", including the provision of post-adoption services. Their adoptive parents asserted concomitant liberty interests in receiving adequate information to make an informed adoption decision and sufficient training to enable the parents

to care for their adopted children. Complaint, ¶ 18.

In their brief in opposition to TDHS Motion to Dismiss, filed in district court, appellants abandoned these original allegations, speaking instead of the children's "liberty interests in living in non-restrictive circumstances, in being autonomous, and [in] fulfilling each of their individual personalities." The parents' rights were now said to include a liberty interest in "raising a family as befits their deepest wishes and convictions, and a property interest in preserving their resources." *Id.*

Before our court, appellants' original brief amalgamates and modifies these two viewpoints into yet a third position. The children's liberty interests suffer "in all the ways that flow from not being cared for and treated properly for years," including that "some children have police records that they might not have otherwise had." Appellants' Brief at 13. In addition, the children suffered injury to their property interests because "the more thousands that their parents have spent for treatment, the less money there has been for the children." *Id.* at 13-14. The children now deny that they advanced a "right to services" as one of their protected interests. From the Griffiths' perspective, the Commissioner's program "is equivalent to his taking of their property or his quartering of soldiers in their homes." *Id.* at 17. The adopted children physically injured other family members, destroyed property, and disrupted families and marriages. By inducing the Griffiths to adopt their children under what amounted to false

pretenses, the state interfered with the parents' right to be free from these consequences. The parents even allege that they might not have adopted the children had they "known the truth."

At the beginning of their reply brief, appellants repudiate these new claims and revert to their original allegations, including that TDHS deprived appellants of their protected rights by failing to provide adequate post-adoption services. Appellant's Reply Brief at 7. Several pages later, appellants contradict this position, just as they did in several other briefs, by professing that "plaintiff parents and children have never sought to establish any...fundamental rights [in securing records and services]." *Id.* at 13.

Instead, appellants seek recognition that TDHS' adoption program endangered the children by removing them from "the hands of persons with *knowledge of their backgrounds* of abuse handicap and medical need" and placing them in a "dangerous situation" with parents who "attempt to raise them with the most crucial information about the children's backgrounds." *Id.* at 13. By asserting that TDHS knew about the children's handicaps, this new allegation negates appellants' prior claims that TDHS failed to develop adequate information about these children. In the end, appellants conclude that this court need not even undertake a fundamental rights analysis regarding the injuries asserted here, since TDHS' conduct "shocks the conscience."

Despite this last suggestion, we must determine whether the Griffiths have alleged a deprivation of any "liberty" or "property" interests protected under the Due Process Clause. Appellants have not founded their claims on specific provisions in the Bill of Rights. Consequently, the Griffiths will receive due process protection only if their asserted interests are "fundamental" in the constitutional sense, or if they have been deprived of property interests under state law. Because the Griffith parents and children assert different liberty interest for which they seek constitutional protection, their claims deserve separate treatment.

2. *Liberty Interest -- The Parents.*

The parents essentially contend that TDHS coerced or duped them into adopting by placing the children in their adoptive home without developing complete information about the children's backgrounds and without releasing all available information to the parents. They argue that this practice amounts to government interference with their "fundamental interest" in deciding to adopt, because it violates their right to "informed" decision-making on behalf of their family.

Although the Supreme Court has rendered decisions defining various elements of family

relationships as "fundamental interests"[5] none of those cases announced a "fundamental interest" in adopting children. What consequences would flow from the recognition of such an interest are unclear. The adoption process is now heavily regulated by states for the protection of all parties involved. *See* discussion in *Part II supra.* If the right to adopt is "fundamental," must the courts review whether states may require that adoptive parents be sane, honest, financially capable or otherwise qualified to be good parents? When does the "fundamental right to adopt" overcome the right of privacy of the birth parents? May the state decide that certain kinds of children, contrary to the wishes of particular prospective parents, may not be adopted? To assert that such an individualized "fundamental right" exists is sloganistic and oxymoronic, since society must balance the interest of at least three parties--birth parents, child, adoptive parents--when legitimating adoptions. The Griffith parents do not pose these questions, but they seem to be the inevitable result of a determination that adoption is a "fundamental right." Bearing in mind Justice White's admonition

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5. *Michael H. v. Gerald D.*, --U.S.---, 109 S.Ct. 2333, 2342, 105 L.Ed.2d 91 (1989); *Lehr v. Robertson*, 463 U.S. 248, 256-58, 103 S.Ct. 2985, 2990-91, 77 L.Ed.2d 614 (1983); *Santosky v. Kramer*, 455 U.S. 745, 753-64, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845-46, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 498-99, 97 S.Ct. 1932, 1935-36, 52 L.Ed.2d 531 (1977)(plurality opinion); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 639-40, 94 S.Ct. 791, 796-97, 39 L.Ed.2d 52 (1974); *Wisconsin v. Yoder*, 406 U.S. 205, 231-33, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1943)

against the creation of novel fundamental rights, we cannot recognize a "fundamental right" to adopt a child.

The parents would respond that the fundamental interest for which they seek recognition is narrower than we construe it, because it arises from the state's responsibility toward them after they became prospective adoptive parents. Perhaps the "fundamental right" can be regulated by the state at the outset, they would concede, but once the state approved them as adoptive parents, it could not "interfere" with their decision by providing incomplete or misleading information about the children. We believe it to be highly dubious that a "fundamental right to adopt" could be confined as the Griffith parents suggest, but even on those terms, the "fundamental interest" in "informed decision making" which they advocate continues to come up short constitutionally.

The parents' formulation of their "right" is necessarily characterized not in terms of an action they may take autonomously, as in the conventional substantive due process cases,[6] but is gauged according to some hypothetical entitlement from the state. The Griffiths do not tell us precisely what information, training or services they should have received from the state before deciding to adopt five hard-to-place children, but they are sure that what they received was not enough. "Not enough" therefore should

6. *Moore*, 431 U.S. at 495, 97 S.Ct. at 1932; *LaFleur*, 414 U.S. at 640-47, 94 S.Ct. at 796-99; *Yoder*, 406 U.S. at 213-15, 92 S.Ct. at 1532-33; *Stanley*, 405 U.S. at 645, 92 S.Ct. at 1208

"shock the judicial conscience" and entitle them to a remedy founded on the Constitution. The Constitution should be held to require "more"--information, training and/or services both before and after such adoptions. The Griffiths' claim starkly raises the distinction between governmental interference and governmental assistance as a basis for Due Process relief. However, as the Supreme Court explained in *DeShaney v Winnebago County DSS*,--U.S.---,109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989):

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security....[I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . .
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life; liberty or property interest of which the government itself may not deprive the individual. (citations omitted).

See also, Webster v Reproductive Health Services,--U.S.---, 109 S.Ct. 3040, 3051, 106 L.Ed.2d 410 (1989); *Youngberg v Romero*, 457 U.S. 307, 317, 102 S.Ct. 2452, 2459, 73 L.Ed.2d 28 (1982); *Harris v. McRae*, 448 U.S. 297, 317-18, 100 S.Ct. 2671, 2688-89, 65 L.Ed.2d 784 (1980) (no obligation to fund abortions or other medical services).

Requiring TDHS to develop and present additional information to the prospective parents and to train prospective parents about how to care for handicapped children would amount to a mandate that TDHS provide additional affirmative governmental assistance to secure the ability to adopt. *DeShaney* demonstrates that the Due Process Clause does not demand positive assistance to secure constitutional rights. Moreover, by obligating TDHS to research potential consequences of a child's mental or emotional handicap, as the Griffiths urge, we would convert TDHS from an insurer of the child's physical and mental health. This result, too, is contrary to *DeShaney*. While information and training provided by the state may aid parents in caring for their adopted special-needs children, the state and not the courts should determine whether and in what forms to provide that aid. Characterizing the Griffiths' claims as a violation of a "fundamental right" would upset the balance the state has struck without furnishing any guidance for "constitutional" adoption programs beyond the preference of the trial court or this court. Appellant parents have not advanced a "liberty interest" of which they were

deprived by the state.

3. *Liberty Interests -- The Children*

The Griffith children advance two liberty interests distinct from those asserted by their parents: their interest in the "uninhibited development of their personalities" and their "interest in living in non-restrictive circumstances."

The Supreme Court's decisions regarding "fundamental interests" are more easily enumerated than analyzed. Building logically on past decisions to define a new "fundamental right" is, to put it mildly, difficult. In this case, however, we easily conclude that the "personality interests" asserted by the Griffith children are beyond anything even remotely suggested in other substantive due process cases and, indeed, would require a breathtaking extension of that doctrine. The children allege nothing less than the state's responsibility to have maximized their personal psychological development. This obligation, and the appellants' "right," are said to derive from the state's having once been a custodial parent for the children. Fulfillment of the "right" is measured by vague and imprecise criteria which boil down to (1) a demand for services by the state to "remedy" the damage it allegedly did and (2) an invitation for the federal courts to specify the level of remedy in such a way as essentially to engineer the state's social program. This affirmative "right" is wholly different from the libertarian, autonomous rights created in previous

substantive due process cases.[7] Although the children's "right" is described differently from the Griffith parents' asserted "right to adopt," it suffers from the same flaw, i.e., its essential reliance on affirmative acts by the state. *DeShaney* forecloses the recognition of the children's claim as it did that of the parents.

The Griffith children also assert their right to live in unrestrictive circumstances, as supported by the Supreme Court's "special relationship" cases. *See Youngberg*, 457 U.S. at 317, 102 S.Ct. at 2459. These cases are completely inapposite. A special relationship exists "when the State by an affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself." *DeShaney*,--U.S. at---, 109 S.Ct. at 1005. Although the Due Process Clause generally does not require a governmental body to assist the public, a duty to provide adequate protective services may arise out of "special relationships" created or assumed by the state with regard to particular individuals. *DeShaney*,--U.S. at ---, 109 S.Ct. at 1004. This relationship has arisen when a state "takes a person into its custody and holds him there against his will." *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976) (prisoners); *Hamm v. DeKalb County*, 774 F.2d 1567 (11th Cir. 1985), *cert. denied* 475 U.S. 1096, 106 S.Ct. 1492, 89 L.Ed.2d 894 (1986) (pretrial detainees); *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239,

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7. *See* n. 6 *supra*.

103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) (criminal suspects injured during apprehension); *Youngberg*, 457 U.S. at 316-318, 102 S.Ct. at 2458-59 (1982) (institutionalized mentally retarded persons).[8] It is essential to realize that the state's duty to provide services stems from the limitation which the state has placed on the individual's ability to act on his own behalf, and not from the state's knowledge of the individual's predicament or from its expressions of intent to help him. *DeShaney*, 109 S.Ct. at 1006.

TDHS created a "special relationship" with the Griffiths' children when it removed them from their natural homes and placed them under state supervision. At that time, TDHS assumed the responsibility to provide constitutionally adequate care for these children. Appellants do not allege that TDHS neglected its duties while the children remained under TDHS custody--indeed, they aver that children under state care received superior assistance over children in private homes. Further, appellants do not precisely assert that Texas arranged for inadequate permanent placement in their family. Instead, they urge us to recognize an ongoing special relationship between TDHS and the adopted children, which requires TDHS to ex-

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8. *Taylor by and Through Walker v. Ledbetter*, 818 F.2d 791, 796-98 (11th Cir. 1987) cert. den.--U.S.---, 109 S.Ct. 1337, 103 L.Ed. 2d 808 (1989); *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981) cert. den., 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). The "liberty interests" recognized in these cases have not been considered by our court or by the Supreme Court.

tend additional services. The Supreme Court has rejected a similar claim. In *DeShaney*, 109 S.Ct. at 1006, the Court found that, although Wisconsin has assumed a special relationship towards Joshua when it removed Joshua from his natural home, the state terminated this relationship when it returned Joshus to his parents, even though the state knew that such action might endanger Joshua. As the Court reasoned:

> The State does not become the permanent guarantor of an individual's safety having once offered him shelter.
> *Id. at 1006.*

When TDHS placed the children in the Griffiths' home, the Griffiths assumed the same rights and duties toward the children as natural parents. 2 Tex. Fam. Code Ann. § 16.09(a) (Vernon 1986 and Vernon Supp. 1990). That TDHS once acted at guardian for the children does not oblige the state to provide continual service to those children placed in permanent homes. Any "liberty interest" that the children might have asserted under the "special relationship" doctrine while in state custody lapsed when the parents officially adopted the children. Thus, appellants' complaint has not advanced a constitutionally protected liberty interest.

4. *Property Interests*

Appellants' complaint could still state a claim under the Due Process Clause if it raises a cognizable property interest of which Texas deprived the appellants. "The hallmark of prop-

erty . . .is an individual entitlement grounded in state law which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982). Appellant parents assert that TDHS deprived them of two property interests: basic services provided by Texas and money which the parents spent to care for the "special needs" children. Neither of these arguments survives scrutiny.

Appellants have not demonstrated an entitlement to post-adoption services or training under state law. The statutes regulating adoption in Texas permit TDHS to provide services to adoptive families, but the social worker has discretion to determine whether or not the family qualifies for the benefits. Tex. Hum. Res. Code Ann. §§ 47.031-47.032 (Vernon Supp. 1990). Where the enabling statute confers discretion on the state agency without providing objective criteria for the limitations on that discretion, the statute does not create an entitlement for Due Process purposes. *See Board of Pardons v. Allen*, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987); *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983); *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S.Ct. 2460, 2464-65, 69 L.Ed.2d 158 (1981); *Neuwirth*, 845 F.2d at 557. Consequently, the Griffiths do not hold a property interest in TDHS training and services.

The Griffiths do hold a property interest in their monetary resources. However, TDHS did not "deprive" them of this interest. TDHS

did not require the parents to make any particular expenditures on behalf of their children. The parents elected to adopt hard-to-place children and could have anticipated that the expenses to care for these children would exceed those for a normal child. To make TDHS responsible for these added expenditures would, again, convert TDHS into an insurer of adoptions. Any adoptive parent who expended more money than anticipated to care for an adopted child could contend that the state should subsidize this added burden.

The Griffiths seek to refine their position, contending that if TDHS had provided additional information about these children's backgrounds, the family would have pursued immediate medical and psychological care for the children thereby incurring lower treatment expenses. This argument merely raises the adequate information claim in another context and suffers from the same deficiency. While the state may not interfere with a parent's right to make treatment decisions on behalf of a child, the state need not, as a matter of constitutional duty, help the parents diagnose the problem and locate the cheapest treatment alternative. *DeShaney*, --U.S. at ---, 109 S.Ct. at 1003; *Youngberg*, 457 U.S. at 317, 102 S.Ct. at 2459. The parents have not alleged a claim for the deprivation of a constitutionally protected property interest.

Since the appellants have failed to advance a liberty or property interest which merits Due Process scrutiny, they have failed to state a claim under the Due Process Clause of the Fourteenth Amendment.

V.
EQUAL PROTECTION

In addition to their Due Process claim, appellants have alleged that TDHS' adoption program, as implemented, violates the Equal Protection rights of adopted children by providing greater services to children in state custody than to children in private custody. The Equal Protection Clause of the Fourteenth Amendment commands that no State "shall deny to any person within its jurisdiction the equal protection of the laws." Its mandate requires a state to treat all similarly situated persons alike. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 442, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985); *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). Appellants' error rests in the contention that their children and children remaining in state custody and children remaining in state custody are similarly situated for purposes of the Equal Protection Clause.

When Texas removes children from the custody of their natural parents, the state becomes the managing conservator for those children. 2 Tex. Fam. Code Ann. §§ 11.01 et seq., § 15.02, § 15.05(b), § 14.01(a), (c) (Vernon 1986 and Vernon Supp. 1990). As managing conservator, the state has a duty to provide the children with "clothing, food, shelter and education", as well as "care, control, protection, moral and religious training, and reasonable discipline." 2 Tex. Fam. Code Ann. § 14.02(b) (Vernon 1986 and Vernon Supp. 1990). *See DeShaney*,--U.S.---, 109 S.Ct. at 1005-06; *Young-*

berg, 457 U.S. at 316-18, 102 S.Ct. at 2452; *Lelsz v. Kavanagh*, 807 F.2d 1243, 1250 (5th Cir. 1987). The state's responsibility terminates when the state court finalizes the adoption, and the adoptive parents assume all rights and responsibilities over the child, including the support responsibilities previously placed on the state. 2 Tex. Fam. Code Ann. §§ 12.04, 16.09(a) (Vernon 1986 and Vernon Supp. 1990).

Adopted children who rely upon their adoptive parents for support and children under state conservatoires, are in no way similarly situated with regard to the medical and psychological services provided by the state. The state has no responsibility to treat these disparately situated children identically. Appellants have failed to state an Equal Protection cause of action.

VI

CONCLUSION

This court does not ignore the tragic circumstances that led the Griffiths to file suit. Any parent's heart would be torn by the knowledge that a child, burdened by severe psychological troubles, has wounded himself and his family. Tragedy does not necessarily presuppose a constitutional violation, however, and we have found none based on the Griffiths' pleadings. We express no opinion, of course, on the merits of their Federal or State-law claims.

We AFFIRM the judgement of the district court.

APPENDIX D

IN THE UNITED STATE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3-88-1211-H

SUSAN and REGGIE GRIFFITH, et al.
Plaintiffs

versus

MARLIN JOHNSTON, Individually and as Commissioner of the Texas Department of Human Services
Defendant

MEMORANDUM OPINION AND ORDER

Before the Court are Defendant's Motion to Dismiss pursuant to *Fed. R. Civ. P.* Rules 12(b)(1) and 12(b)(6), filed August 4, 1988, and Plaintiffs' Brief in Opposition, filed September 7, 1988.

INTRODUCTION

This is a class action brought on behalf of adoptive parents and adopted children against the public agency through which the children were adopted, The Texas Dept. of Human Services ("TDHS"). Plaintiffs are six parent couples who, when this lawsuit was filed, had adopted twenty-seven children. Eighteen of the children

are "special needs" children and are also Plaintiffs. Plaintiffs' Response at 2.

TDHS administers a program designed to promote the adoption of hard to place children by providing information for prospective parents concerning the availability of such children, assisting the parents in the adoption process, and providing financial assistance necessary for the parent to adopt the child. Defendant's Brief at 4.

Plaintiffs in this case claim that the Commissioner's failure to disclose information concerning "special needs" children and his failure to provide services during and after their adoption--services that the adoptive parents could not afford--had dramatic consequences.[1]

In four separate claims, Plaintiffs allege that Defendant violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution by impinging on certain liberty and property interest[2] and by failing to disclose fully information concerning these

1. Parents allegedly did not know of, and therefore did not treat, their children's physical, mental, and emotional problems. When their children reached pre-teen age, many began behaving in antisocial ways, attacking siblings and parents, destroying property, committing criminal acts. Several parents had to institutionalize their adopted children; other parents had to provide treatments that allegedly would not have been required had full and correct disclosure and services been given earlier. Plaintiffs' Response at 2-3.

2. Plaintiffs assert that the children have liberty interests in living in non-restrictive circumstances, in being autonomous, and in each fulfilling their individual personalities. Plaintiffs further assert that the parents have liberty interests in raising a family as befits their deepest wishes and convictions, and a property interest in preserving their resources. Plaintiffs' Response at 3-4.

"special needs" children. Additionally, the Commissioner allegedly violated the Equal Protection Clause by failing to provide certain services to children after they were placed in adoptive homes. Finally, Plaintiffs assert several claims under the Adoptive Assistance and Child Welfare Act of 1980, 42 U.S.C. §673.[3]

The Supreme Court has stated that dismissal under Rule 12(b)(6) should be granted only when Plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

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3. Defendant explains the relevance of § 673 (c).

In general a special needs child is an eligible child (i.e., a child who would have been eligible for AFDC or SSI had they remained in their own home), who is determined by the State *at the time of his or her placement for adoption*, not to be adoptable without some adoption assistance in the form of cash assistance or medical assistance under the state's medicaid plan. The amount of cash payments permitted by the Act are limited to an amount not to exceed the amount that would have been paid on behalf of the child if the child had been in a *foster family* home. (Currently in Texas about $11.00 per day). 42 U.S.C. § 673 (a) (3). By definition there can be no retroactive determination of "Special Needs" or retroactive eligibility of Title IV-E adoption assistance. Federal adoption assistance does not apply to children placed for adoption prior to October 1, 1982.

Defendant's Brief at 7 (emphasis in the original).

DUE PROCESS CLAUSE CLAIMS

Plaintiffs claim that Defendant's failure to: (1) disclose information essential to the care of these children (Claim I); (2) learn certain facts concerning these children (Claim II); (3) train workers and Adoptive Parents to give care required by these children (Claim III); and (4) provide essential services (Claim IV) was in violation of Plaintiffs' liberty and property interests, "in violation of the Due Process Clause of the Fourteenth Amendment." Complaint at 7; Defendant's Brief at 2.

I. PROPERTY INTERESTS

Defendant interpreted Plaintiffs' Complaint as alleging procedural due process violations but Defendant nevertheless raises substantive due process arguments. In their Response, Plaintiffs clarify their position by arguing that theirs is a substantive due process claim and that Defendant has failed to show that no cause of action can be supported.

The property interest to which Plaintiffs refer is the interest in money that they claim they have had to spend in caring for these children, care expenses that would not have been incurred had Defendant properly researched and informed parents of the children's background.

Plaintiffs also assert that the children have an interest in the provision of certain basic services from the State of Texas.[4] The services sought by Plaintiffs are defined in part as being residential psychiatric treatment, Plaintiffs' Response at 10, and therapeutic camping, testing, and evaluation. Defendants' Brief at 13. None of these services are currently available at post-adoptive children under state law, Defendant's Brief at 13.

Accepting Plaintiffs' allegations as true, the Court is unable to discern a federal right of which Plaintiffs have been deprived. Plaintiffs' substantive due process claim for deprivation does not state a federal claim upon which relief can be granted.

II. LIBERTY INTERESTS

1. Freedom from Restraint; Autonomy

Plaintiffs assert that "special needs" children have an interest in living in non-restrictive circumstances and in becoming autonomous persons. To support this statement, Plaintiffs cite *O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975) and *Youngberg v. Romeo*, *supra*. Plaintiffs' Response at 6-7.

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4. In support of this theory, Plaintiffs cite *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (education) and *Youngberg v. Romeo*, 457 U.S. 307, 318-325 (1975) (safety, freedom from bodily restraint).

Plaintiffs' cited cases are not on point. In *O'Connor*, the respondent was a mental patient in a Florida State hospital. He had been civilly committed and had been kept in custody against his will for over 15 years. The Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *O'Connor*, 422 U.S. at 576. In the case before the Court, the state has not forced the continued confinement of the Plaintiff children.

Similarly in *Youngberg*,[5] the respondent, who was mentally retarded, was involuntarily committed to a Pennsylvania State institution. Respondent's mother and next friend filed a §1983 action against the state institution, claiming that her son had constitutional rights to safe conditions of confinement, freedom from bodily restraint, and training or "habilitation." The Court held that respondent had protected liberty interests in safe conditions of confinement, freedom from bodily restraint and minimal "training and development of needed skills." 457 U.S. at 314-17.

The *Youngberg* Court emphasized, however, "[a]s a general matter, a state is under no constitutional duty to provide substantive ser-

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5. This Court has had occasion to analyze *Youngberg v. Romeo* before. *See Lelsz v. Kavanagh*, 673 F. Supp. 828 (N.D. Tex. 1987).

vices for those within its border."[6] 457 U.S. at 317 (citations omitted). The Court then explained that when a person is "wholly dependent on the State" "a duty to provide certain services and care does exist." 457 U.S. at 317. The Court concluded "that respondent's primary needs are bodily safety and a minimum of physical restraint, and respondent clearly claims training related to these needs."[7] 457 U.S. at 317-18.

Again, in the case before the Court, the Plaintiff children are not wards of the state and neither *Youngberg* nor *O'Connor* are on point. Plaintiffs argue that "by placing the children in adoptive homes without disclosing their background of severe physical, sexual and emotional abuse and by failing to provide services that he knew or should have known were needed by the children," the Commissioner made the children "less free." Plaintiffs' Response at 7. Following this argument is the notion that the Commissioner has thereby forced the institutionalization of the children and is, therefore, responsible for their treatment. Plaintiffs' Response at 7.

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6. The Court also noted that the respondent was not arguing that if he were still at home, the state would have an obligation to provide training at its expense--the Court's implication being that the state would have no such obligation. But, because the respondent was confined by the state, the state had certain basic responsibilities. 457 U.SS. at 317.

7. The Court cautioned that "this case does not present the difficult question whether a mentally retarded person, *involuntarily committed to a state institution*, has some general constitutional right to training *per se*." 457 U.S. at 318 (emphasis added).

This reasoning is not supported by *Youngberg* or *O'Connor*. It represents an extension of constitutionally protected interests which those cases do not contemplate and, indeed, by implication disavow. The Plaintiff children are not involuntarily confined by the state. Plaintiffs do not define any federally protected liberty interests of which they have been deprived by the Commissioner and have, therefore, failed to state a claim upon which relief can be granted.[8]

2. Personality Development

Plaintiffs claim that the children have a privacy/liberty interest in fulfilling their own personalities. To support this conclusion, Plaintiffs cite Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (affirming "privileges long recognized at Common Law as essential to the orderly pursuit of happiness by free men"). This citation does not clarify how Defendant's policies inhibit the free personality development of Plaintiff children; in any event, the allegation of inhibition of free personality development does not amount to deprivation of a federal right and, therefore, fails to state a claim.

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8. Plaintiffs charge the Defendant with the years of delay in not treating Plaintiff childrens' abuse. Plaintiffs' Response at 8. Plaintiffs do not explain or justify, however, why the Defendant is obliged under the Constitution to treat the children who have already been adopted.

3. Family Interests

Plaintiffs allege that the parents have an interest in raising their families as befits their wishes and convictions"[9] and that Defendant's practices have interfered with this interest. Plaintiffs' cited authorities do no support, and the Court has been unable to discern, a cause of action under the Constitution for this claim in the context of this case.

Plaintiffs' due process claims are DISMISSED for failure to state a claim upon which relief can be granted.

EQUAL PROTECTION CLAIMS

Plaintiffs argue that adopted "special needs" children are entitled to the same services that such abused or disabled foster care children receive. They suggest that Defendant's denial of these services (and other services that are not even foster care children receive) is a violation of the Equal Protection Clause of the Constitution. *See* Defendant's Brief at 8.

Defendant argues that equal protection extends to "persons similarly situated", *City of Cleburne, Texas v. Cleburne Living Center*, 473

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9. Plaintiffs cite *Meyer v. Nebraska, supra; Moore v. City of East Cleveland*, 431 U.SS. 494 (1977) (affirming freedom of personal choice in matters of marriage and family life); and *Zablocki v. Redhail*, 434 U.S. 374 (1978) (affirming freedom relating to the right to marry).

U.S. 432 (1985), and that adopted and foster care children are not so similarly situated. Plaintiffs submit that there are factual issues that preclude decision on the equal protection issue: specifically, whether foster care children are differently situated from adopted children.

The State has a duty to care for children in its conservatorship. V.T.C.A. Family Code § 14.02(b). Adoptive parents owe a duty of care once the adoption is consummated; the state's duty ends except as provided by law. V.T.C.A. Family Code §§ 16.09, 12.04; V.T.C.A. Human Resources Code § 47.001 et. seq.

Plaintiff children live with their adoptive parents and are not wards of the state as are foster children. Thus, as a matter of law, Plaintiff and foster children are not similarly situated.[10]

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10. Even if the children were considered to be similarly situated, they are not members of a "suspect class" and the Court would use a rationality test to determine whether their treatment is related to a legitimate state interest. The Court finds meritorious Defendant's argument on this matter.

> The legitimate state interest articulated by state law is that the program benefit hard to place children residing in foster homes, at state and county expense by providing them with the stability and security of permanent homes and that the cost paid by the state and counties be reduced. V.T.C.A. Human Rsources Code § 47.001.

The fact that certain services are not available to children after they are adopted to the same extent as they were prior to their adoption is clearly rationally related to a legitimate state interest . .

Defendant's Brief at 19-20.

Plaintiffs' equal protection claim is DISMISSED for failure to state a claim upon which relief may be granted.

ADOPTION ASSISTANCE ACT CLAIMS

Plaintiffs allege that Defendant failed to provide sufficient information regarding the availability of assistance under the Act, 42 U.S.C. § 673, to properly determine the eligibility of parents under the Act, or to negotiate in *bona fides* with parents eligible for assistance.

Defendant explains that many of the named Plaintiff children cannot allege such entitlement as they were adopted prior tot the effective date of Title IV-E adoption assistance in Texas, October 1, 1982. See Klickman Affidavit at 3. Moreover, Defendant emphasizes that Plaintiffs have not alleged that they are entitled to but not receiving benefits under the Act.

Plaintiffs answer that due to the Commissioner's failure to supply relevant information, Plaintiffs do not know whether the children have an entitlement. This argument does not address the issue of adopted child versus foster child eligibility for those children adopted before October 1, 1982 and otherwise ineligible for benefits under the Act.

As to those children adopted after October 1, the Act does not specifically require the State to inform prospective parents of adoption subsidies. State policies set out the procedures to be followed in informing prospective parents of the

availability of both State and Title IV-E assistance. Texas Department of Human Services, Child Protective Services Handbook, § 1561 (Klickman Aff., Ex. B).

Any right to an adoption assistance agreement is dependent upon a determination by the State, at the time the adoption is consummated, that the child being adopted has "special needs", is eligible, and that the adoptive parents meet the specified income requirements. Defendant's Brief at 22-23.[11] In any event, at this early stage of the case, the Court cannot say that Plaintiffs, or some of them, can prove no set of facts which would entitle them to relief under the Adoption Assistance Act.

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11. Plaintiffs argue that entitlement arises out of the financial circumstances of the biological parents, information that the Commissioner has failed to disclose. Sections 1561.1(4) and 1561.2(4) refer, however, to the financial circumstances of the child, mentioning "survivors' benefits the child receives related to his biological family" and deprivation of parental support. Furthermore, section 1562 refers to "the financial ability of the parents" but the Handbook is clearly referring to the adoptive parents. Klickman Aff., Ex. B.D.

CONCLUSION

Plaintiffs' due process and equal protection claims are DISMISSED without prejudice for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. Rule* 12(b)(6). Defendant's Motion to Dismiss Plaintiffs' claims under the Adoption Assistance Act is DENIED. *Conley v. Gibson, supra.*

SO ORDERED

DATED: November 9, 1988

BAREFOOT SANDERS
ACTING CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

APPENDIX E

IN THE UNITED STATE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

No. CA3-88-1211-H

Class Action

SUSAN and REGGIE GRIFFITH, on behalf of themselves and on behalf of their children, CYNTHIA, GEOFFREY, ANTHONY, MELANIE and DAVARRIS; BONNIE and JIM HARLOW on behalf of themselves and on behalf of their children, CHRIS, JODY, ASHER, and ROSALIE; CHERYL and REV. BOB CHANDLER, on behalf of themselves on behalf of their child, TINA; ADOPTIVE PARENTS A and B, on behalf of themselves and on behalf of their children, ADOPTED CHILDREN A, B, C and D; ADOPTIVE PARENTS E and F, on behalf of themselves and on behalf of their children, ADOPTED CHILDREN E, F and G; ADOPTIVE PARENTS H and I, on behalf of themselves and on behalf of their child, ADOPTED CHILD H; and each of the above parties on behalf of parents and children similarly situated,

Plaintiffs,

vs.

MARLIN JOHNSTON, Individually and as Commissioner of the Texas Department of Human Services

Defendant,

COMPLAINT

Plaintiffs, by their attorney, Neil H. Cogan, assert:

Nature of Action

1. This is an action by adoptive parents of special needs children, so-called "Wednesday's children," on behalf of the parents, on behalf of the children and on behalf of parents and children similarly situated. The action seeks to vindicate the rights of the parents and the children under the Due Process and Equal Protection Clauses of the United States Constitution and the Adoption Assistance and Child Welfare Act of 1980 (hereinafter "Adoption Assistance Act").

Jurisdiction

2. Plaintiffs' claims arise under Amendment XIV of the United States Constitution, 42 U.S.C. 670 et seq., and 42 U.S.C. 1983. This Court's jurisdiction is founded under 28 U.S.C. 1331, 1343 and the United States Constitution art. III.

Parties

3. Plaintiffs Susan and Reggie Griffith reside at 1500 Larchmont, Plano, Texas 75074. They have adopted ten children, among them Plaintiffs Cynthia, Geoffrey, Anthony, Melanie, and Davarris, each of whom was formerly in the custody of the Texas Department of Human Services (hereinafter (Human Services"). Cynthia was placed with the Griffiths on September 24,

1976, and was adopted on April 25, 1977. Geoffrey was placed on June 24, 1977, and was adopted on August 29, 1978. Anthony was placed on October 13, 1977, and was adopted on August 29, 1978. Melanie was placed on November 29, 1978, and was adopted on December 11, 1979. Davarris was placed on or about March 1982, and was adopted on December 14, 1982.

4. Plaintiffs Bonnie and Jim Harlow reside at 5701 Tremont, Dallas, Texas 75214. They have five adopted children, among them Plaintiffs Chris, Jody, Asher, and Rosalie, each of whom was formerly in the custody of Human Services. Chris was placed with the Harlows on June 6, 1978, and was adopted on December 13, 1978. Jody was placed and adopted on November 23, 1987. Asher was placed December 13, 1979, and was adopted October 30, 1980. Rosalie was placed February 15, 1983, and was adopted September 27, 1983.

5. Plaintiffs Cheryl and Rev. Bob Chandler reside at 8511 Bacardi, Dallas, Texas 75238. They have adopted one child, Tina, who was formerly in the custody of Human Services. She was placed with the Chandlers on November 1, 1978, and was adopted on July 6, 1979.

6. Plaintiffs Adoptive Parents A and B reside in Dallas County, Texas. They have adopted four children, Plaintiffs Adopted Children A, B, C and D, each of whom was formerly in the custody of Human Services. The Plaintiff children were placed and adopted in the mid-1980's.

7. Plaintiffs Adoptive Parents E and F reside in Dallas County, Texas. They have adopted six children, among them Plaintiffs Adopted Children A, B and C, each of whom was formerly in the Custody of Human Services. The children were placed and adopted in the late 1970's and early 1980's.

8. Plaintiffs Adoptive Parents H and I reside in Tarrant County, Texas. They have one adopted child, Plaintiff Adopted Child I, who was formerly in the custody of Human Services. The child was placed and adopted in the mid-1980's.

9. Defendant Marlin Johnston is Commissioner of The Texas Department of Human Services, a department of the State of Texas, with its principal office at 701 W. 51st Street, Austin, Texas 78751. At all times relevant to this action, Human Services has had the duty to protect children who have become dependent or neglected; in pursuit of that duty, Human Services has taken custody of children and has thereafter placed such children for adoption. At all times relevant to this action, Defendant Johnston, and his predecessors, directed, administered and supervised the policies and practices of Human Services.

Class Action Assertions

10. Plaintiffs bring this action on behalf of a class whose members are both the adoptive parents of children with special needs and such adopted children themselves, a class which

numbers at least in the hundreds and whose members' joinder is impracticable.

11. The entire class has in common the constitutional claims presented herein and a large subclass has in common the statutory claims presented herein.

12. Plaintiffs share the constitutional and statutory claims with the members of the class; Defendant has no defense against Plaintiffs which is not applicable to the entire class.

13. Plaintiffs will vigorously prosecute this action; their attorney is experienced in class-wide public actions.

14. This action is appropriate as a Rule 23(b) (2) action, because the primary relief sought is injunctive relief which, if granted, will be imposed against Defendant for the benefit of the class as a whole.

Claim One: Failure to Disclose Facts Essential to Care of Children with Special Needs

15. Prior to adoption by their present parents, the Plaintiff children were in the custody of Human Services; they were in such custody because Human Services obtained the termination of custody of the children's biological parents.

16. The Plaintiff children were, from the time of Human Service's custody and until now, children with special needs, that is, they were

children who were difficult to place for adoption because of age, race, color, ethnic background, language, or physical, mental or emotional handicap.

17. To the best of their parents' understanding and belief, many of Plaintiff children were physically, sexually, and emotionally abused by their biological parents; furthermore, some of Plaintiff children had handicaps and medical needs for which their biological parents provided little or no care or treatment.

18. In order to make an adoption decision which was informed and in order to give to Plaintiff adopted children the kind of care and treatment which was and is at least minimally adequate (let alone, adequate or optimal), it was essential that Plaintiff adoptive parents have the facts about the abuses suffered by, and the handicaps and medical needs of, Plaintiff adopted children; in order for Plaintiff adopted children to have the kind of care and treatment that was and is at least minimally adequate, it was essential that Plaintiff adoptive parents have such information.

19. The policy and practice of Human Services, as directed, administered and supervised by Defendant and his predecessors, was and is to withhold many of the facts essential to the care and treatment of children with special needs --- including facts about the existence or extent of physical, sexual and emotional abuse; mental and physical handicaps and medical needs of the children; and other vital informa-

tion, such as the social, genetic and medical history of the biological parents and the children's siblings.

20. This policy and practice has been at times intentional, in order to induce the adoption of children with special needs; at all times in reckless disregard of the interests of the adopted children and the adoptive parents; and at all times without appropriate and sufficient justification.

21. This policy and practice has injured the adopted children and adoptive parents in extraordinary ways by, for example, causing adoptive parents unknowingly to postpone for years necessary psychological and medical treatment until children have become *in extremis*.

22. As a result, for example, some adoptive parents have been required to place adopted children in private residential treatment centers and psychiatric institutions, with the resultant immense trauma for the families and financial burdens of thousands and tens of thousands of dollars per month; some adoptive parents have been required to place adopted children in public residential treatment centers and psychiatric institutions, often far from the families' home (and, indeed, sometimes out of state), with similarly immense trauma for the families.

23. And as a result, for example, some adoptive children have been required to undergo medical treatment for conditions far more

serious than would have been the case had they received care and treatment earlier in their lives, with the resultant trauma for children and parents and the financial burdens for parents.

24. This policy and practice of Human Services has violated the liberty and property interests of Plaintiff adopted children and Plaintiff adoptive parents, and the class they seek to represent, in violation of the Due Process Clause of the Fourteenth Amendment.

Claim Two: Failure to Learn Facts Essential to Care of Children with Special Needs.

25. Plaintiffs incorporate herein and reassert the assertions of paragraphs 1 through 24.

26. To Plaintiffs' understanding and belief, the policy and practice of Human Services, as directed, administered, and supervised by Defendant and his predecessors, was and is not to hire psychologists and similar personnel who have training and competence regarding problems peculiar to children with special needs; that is, the psychiatrists and other personnel were and are not competent to learn and communicate the information essential for parents to make informed adoption decisions, as well as the information essential for parents to provide minimally adequate care and treatment for such children.

27. This policy and practice of Human Services has at times been intentional, in order not to pay the costs of specially-trained psychologists; at all times in reckless disregard of the interests of the adopted children and the adoptive parents; and at all times without appropriate and sufficient justification.

28. This policy and practice has caused results and violations such as those described in paragraphs 21 through 24.

Claim Three: Failure to Train Workers and Adoptive Parents to Give Care Essential to Children with Special Needs

29. Plaintiffs incorporate herein and reassert the assertions of paragraphs 1 through 28.

30. The policy and practice of Human Services, as directed, administered and supervised by Defendant and his predecessors, was and is not to train social workers and similar personnel to provide minimally adequate post-placement and post-adoption services to children with special needs and to the parents who have adopted such children; it is likewise the policy and practice of Human Services not to train parents who have adopted such children how to provide minimally adequate care and treatment.

31. This policy and practice of Human Services has at times been intentional, in order not to pay the costs of specially-trained social

workers; at all times in reckless disregard of the interests of the adopted children and the adoptive parents; and at all times without appropriate and sufficient justification.

32. This policy and practice has caused results and violations such as those described in paragraphs 21 through 24.

Claim Four: Failure to Provide Services Essential to Children with Special Needs

33. Plaintiffs incorporated herein and reassert the assertions of paragraphs 1 through 32.

34. The policy and practice of Human Services, as directed administered and supervised by Defendant and his predecessors, was and is not to provide post-adoption services minimally adequate for the care and treatment of children with special needs.

35. This policy and practice of Human Services has at all times been intentional, because its position has been that adoption terminates the duties that Human Services assumed when it took custody from the biological parents; the policy and practice has been at all times in reckless disregard of the interests of the adopted children and the adoptive parents; and the policy and practice has at all times been without appropriate and sufficient justification.

36. This policy and practice has caused results and violations such as those described in paragraphs 21 through 24.

Claim Five: Failure to Provide Children with Special Needs with Services Comparable to Those Received by Like Children in Foster Care or Other State Custody

37. Plaintiffs incorporate herein and reassert the assertions of paragraphs 1 through 36.

38. In addition to the financial assistance that their foster parents receive, children in foster care (including those with special needs) receive many services from Human Services, including testing and evaluation, counseling and therapy, residential treatment and therapeutic camping; children in other forms of Human Services custody also receive many such services.

39. The policy and practice of Human Services, as directed, administered and supervised by Defendant and his predecessors, was and is not to provide such services to children with special needs following their adoption, unless such services are paid for by the adoptive parents.

40. This policy and practice violates the Equal Protection Clause of the Constitution and has caused results such as those described in paragraphs 21 through 24.

Claim Six: Failure to Inform Parents of the Availability of, and Adequately to Determine the Parents' Eligibility for, Federal Adoption Assistance for Children with Special Needs

41. Plaintiffs incorporate herein and reassert the assertions of paragraphs 1 through 40.

42. The policy and practice of Human Services, as directed, administered and supervised by Defendant and his predecessors, was and is not to inform parents who are adopting children with special needs of the availability of federal adoption assistance; moreover, in practice, Human Services does not adequately determine whether such parents are eligible for federal adoption assistance.

43. This policy and these practices violate Sections 671 and 673 of the Adoption Assistance Act and have caused results such as those described in paragraphs 21 through 24.

Claim Seven: Failure to Negotiate in Bona Fides an Adoption Assistance Agreement with Adoptive Parents of Children with Special Needs

44. Plaintiffs incorporate herein and reassert the assertions in paragraphs 1 through 43.

45. The policy and practice of Human Services, as directed administered and supervised by Defendant and his predecessors, was and is not been to negotiate in *bona fides* with

adoptive parents eligible for assistance under the Adoption Assistance Act.

46. Among other things, Human Services has not included in its adoption assistance agreements details (let alone, full details) as to the special needs of the adopted child, so that parents might negotiate for services adequate for the child's care and treatment.

47. Human Services has not included in its adoption assistance agreements notices as to what services will be available from the State, so that parents might negotiate for services that are not otherwise available.

48. Human Services has not included in its adoption assistance agreements notices as to the availability of assistance for special services and for non-recurring expenses, so that parents might negotiate for such assistance.

49. Human Services has not included in its adoption assistance agreements notices of the adoptive parents' hearing and appeal rights and the procedure for filing a request for a hearing or appeal.

50. Human Services has not periodically negotiated with adoptive parents new adoption assistance agreements commensurate with the changed needs of the adopted child.

51. Accordingly, Defendant has violated Section 673 of the Adoption Assistance Act and has caused results such as those described in

paragraphs 21 through 24.

WHEREFORE, Plaintiffs pray that this Court order Defendant to:

a. disclose, with appropriate privacy omissions, to each adoptive parent of a child with special needs the full content of Human Services' files for each of such parent's adopted children;

b. provide, without payment, for the benefit of the class of adopted children with special needs and the parents of such children at least the services minimally adequate for such children's care and treatment, including residential treatment centers and psychiatric hospitals; psychologists trained and competent to evaluate and prepare such children for placement and adoption and to provide parents with the information essential for the adoption decision and minimally adequate care and treatment of such children; social workers trained to teach and counsel the adoptive parents of children with special needs; emergency thirty-day care and longer-term respite care for families of children with special needs, when the families are in crisis; and therapeutic camping for children with special needs;

c. provide, without payment, for the benefit of those children with special needs whose abuse, handicaps, and medical needs went uncared for and untreated as a result of Human Service's failures, whatever care and treatment is appropriate to restore them to the situation in which they would have been but for the failures;

d. inform prospective adoptive parents of the availability of federal adoption assistance and determine with due care the eligibility of parents for such assistance;

e. negotiate in *bona fides* a federal adoption assistance agreement, including those items described in paragraphs 46 through 50 above;

f. pay the costs attorney's fees for this action; and

g. provide what further relief the Court deems appropriate.

Respectfully submitted,

Neil H. Cogan
Attorney for Plaintiffs
Storey Hall (SMU)
3315 Daniel Avenue
Dallas, TX 75275